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LAW REVIEW

**Tolerance of
censorship**

*A case against a right to life group bears disturbing
implications to sexual minorities*

by Geoffrey Wren

On May 31, 1994, the United States Supreme Court refused to review a case where the highest court in Kentucky denied speech rights to a "controversial group." The case, *Capital Area Right to Life, Inc. vs. Downtown Frankfort, Inc.*, says much about the First Amendment's guarantee of freedom of speech in the late 20th century.

Downtown Frankfort, Inc., a private corporation created to revitalize Frankfort, Ky., annually sponsored a "Great Pumpkin Festival" on the city's public mall. Participating groups occupied booths under permits issued by the corporation.

Capital Area Right to Life, an anti-abortion group, had occupied a booth at the 1989 festival. When it requested a booth permit for the 1990 festival, DFI responded that it had changed its

policy. The corporation stated it now "reserve[d] the right to deny participation" to any group deemed "inappropriate" to the festival's purpose. It also told Capital Area Right to Life that it could not have a booth because it was a "controversial group."

Capital Area Right to Life sued. The group claimed that DFI unconstitutionally abridged its right to freedom of speech under the First and Fourteenth Amendments to the U.S. Constitution.

The constitutional guarantee of freedom of speech applies only with respect to government action. Lawyers call this principle "state action." A particular restriction on speech implies federal constitutional rights only when it is "the state" that imposes the restriction. Truly, private action does not go against the Constitution. A private actor, constitutionally, can tell another to shut up.

The requirement of state action does not necessarily require an official state actor. Sometimes private organizations bear enough of a connection with the government that their actions effectively become state actions.

In *Capital Area*, the Kentucky Court held that Downtown Frankfort, Inc., had engaged in state action. The Court reasoned that the corporation received its funding from a public source, that it had taken over a function formerly performed by the city of Frankfort, and, most persuasively, that DFI controlled issuance of permits to those who wanted to set up booths on public property.

The conclusion that DFI was a state actor is important. The Kentucky Court acknowledged that the state, not a private party, impeded Capital Area Right to Life's freedom of speech. The mere fact that DFI restricted the group's speech did not mean that the restriction violated the First Amend-

ment. U.S. Supreme Court decisions have established that the state can impose reasonable time, place and manner restrictions on speech, so long as the restrictions are "content-neutral" and leave open ample alternative channels of communication. The "content neutral" requirement means that the state cannot restrict communication because it does not like the message communicated.

The Kentucky Court held that Downtown Frankfort, Inc., did not abridge Capital Area Right to Life's freedom of speech by denying it a booth.

The Kentucky Court interpreted the U.S. Supreme Court's "content-neutral" requirement "to include being neutral as to the type of message the restriction permits as well as being nondiscriminatory between messages of the same type, so long as there is a logical and legitimate reason for restricting the type of message."

The Kentucky Court considered DFI's denial of the booth permit content-neutral because it denied booth permits to other groups that wished "to engage in 'controversial' speech."

To reach this conclusion, the Court had to tiptoe around the fact that Downtown Frankfort, Inc., itself decided what messages were "controversial" when it doled out booth permits. In a thundering dissenting opinion, two judges on the Court argued that this fact showed why DFI's policy was unconstitutional.

Given the importance of the issues in *Capital Area*, it is odd that the U.S. Supreme Court refused to review the case. Various rea-

sons could explain the Court's action. The Court may not have considered the case an appropriate vehicle to review a regulation of "controversial" speech. Or the Court may have been bothered that the Great Pumpkin Festival had been discontinued by the time the case reached the Supreme Court.

More ominously, certain justices may have agreed that the state should have the right to deny forums to groups it considers controversial. If so, the case bears disturbing implications for sexual minorities.

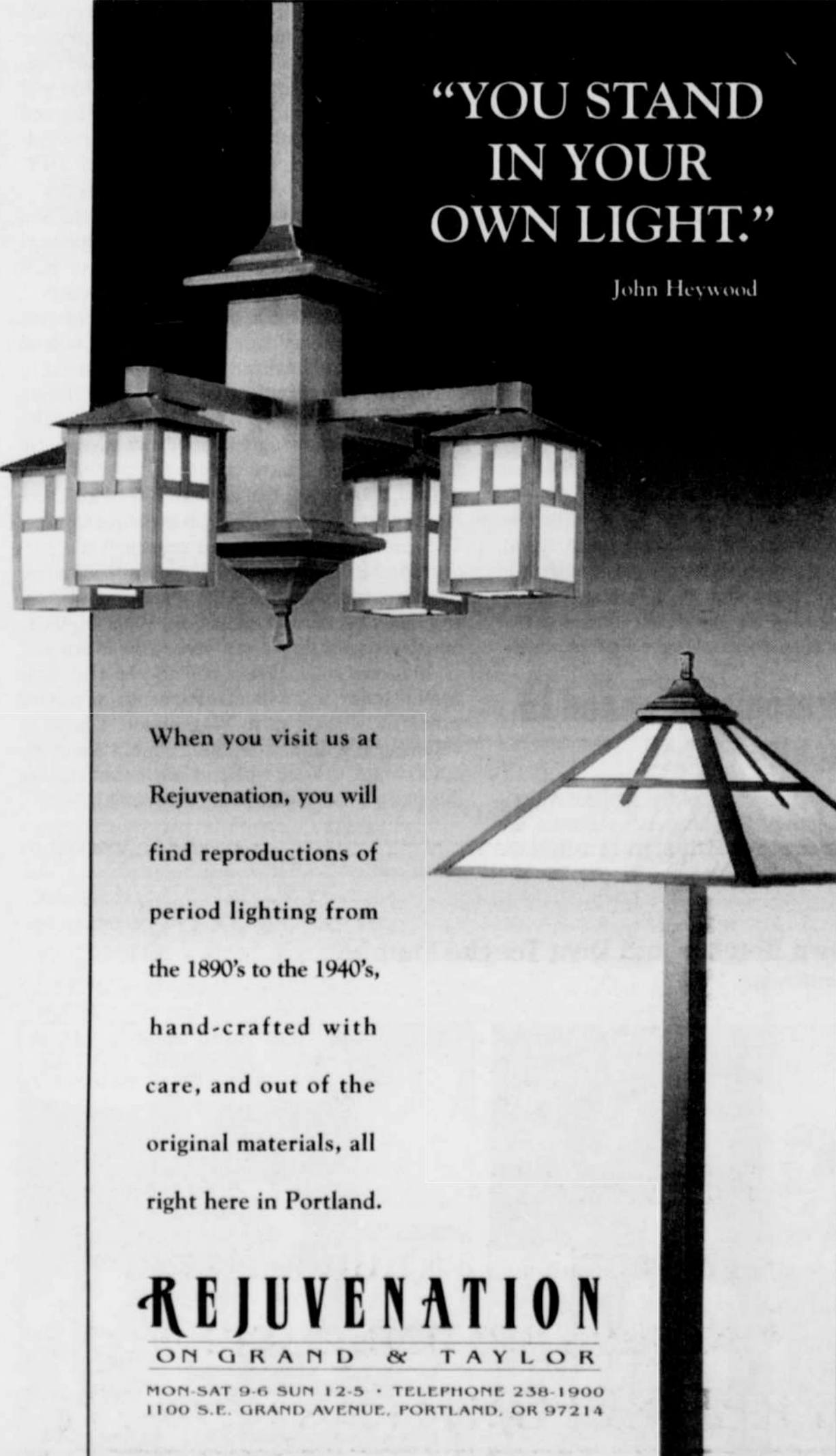
One may not grieve over the restriction of an anti-abortion group's cacophony. But many gay and lesbian groups could earn the tags "controversial" or "inappropriate" in the minds of those charged with doling out permits to public events.

Capital Area shows the ultimate fragility of our freedom of speech. A constitutional right matters only to the extent a court will enforce it. How a court interprets the First Amendment has much to do with societal attitudes towards tolerance of censorship.



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